

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. _____

FAIR MARKET HOUSING)
COALITION)
)
Plaintiff,)
)
v.)
)
UNITED STATES DEPARTMENT)
OF THE INTERIOR)
Defendant.)

INTRODUCTION

1. This Freedom of Information Act (“FOIA”) suit challenges Defendant United States Department of the Interior (“DOI” or the “agency”) with unlawful and unreasonable delay in responding to requests for information about the agency’s Secretary, Ryan Zinke’s communication with Halliburton, Mary Kendall, David Bernhardt and Ben Carson.
2. Plaintiff Fair Market Housing Coalition, a nonprofit public interest organization dedicated to increasing housing in both rural and urban communities, requested information relating to Halliburton and the Montana Land Deal and Secretary Ben Carson’s Communication with Secretary Zinke or David Bernhardt regarding Mary Kendall from January 1, 2018 until the present.
3. While DOI acknowledged the request, it has subsequently stopped communicating

with the Fair Market Housing Coalition despite early communication that the documents would be released within 45 days. DOI does not indicate any expectation of near-term progress on its FOIA request. DOI has failed to make a determination on the FOIA requests or provide any responsive documents to date.

4. DOI has violated FOIA by failing to “promptly” provide requested information and make a determination within 20 working days of receiving a request. 5 U.S.C. § 552(a)(3)(A), (a)(6)(A). In their response letter, DOI had requested an extra 10 days to fulfill the request and has failed to provide the documents despite the extended timeline. The Fair Market Housing Coalition seeks a declaration that DOI has violated FOIA and an order requiring DOI to provide all nonexempt, responsive documents without further delay.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552, 28 U.S.C. § 1331, and 28 U.S.C. § 2201.

6. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i), Plaintiffs are “deemed to have exhausted [their] administrative remedies” because DOI has “fail[ed] to comply with the applicable time limit provisions.”

7. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B). The Fair Market Housing Coalition is a nonprofit organization headquartered and residing in Phoenix, Arizona, in the District of Arizona.

PARTIES

Plaintiffs

8. Plaintiff Fair Market Housing Coalition is a non-profit public interest organization with a focus on rural and urban housing development.

9. The Fair Market Housing Coalition uses public advocacy and the law to protect housing interests of urban and rural communities to ensure that the government serves the people and not special interests. It disseminates public information it gathers to the general public through the web and through other organizations, which is updated regularly, as well as radio, social media, and public comment letters. The Fair Market Housing members also regularly attend and speak at public meetings and hearings throughout the nation, informed by and sharing their analysis of housing and public lands information. The Fair Market Housing Coalition has been actively engaged in protecting urban and rural housing interests at the federal, state, and local levels.

Defendant

10. The United States Department of Interior is an “agency” for purposes of FOIA. 5 U.S.C. § 551(1). DOI has possession or control of the requested information.

FACTS

Background

11. Department of Interior Secretary Ryan Zinke has been accused of unethically pushing a land deal in Whitefish, Montana, which was backed by the chairman of Halliburton.

12. Secretary David Bernhardt received a copy of the complaint and referred the matter to the Council of Inspectors General on Integrity and Efficiency's Integrity Committee (CIGIE).¹

13. In 2018, acting DOI Inspector General Mary Kendall began investigations into Secretary Zinke.²

14. In October 2018, HUD Secretary Ben Carson sent out an email suggesting that Mary Kendall would no longer be the acting Inspector General and would be replaced by an outgoing HUD employee, Suzanne Tufts.³ Mary Kendall remained in her role despite Secretary Carson's email.

15. In January 2019, Secretary Zinke resigned.

16. Deputy Secretary Bernhardt replaced Secretary Zinke as Acting Secretary and later was confirmed as the Secretary of the Department of Interior.

¹ See Kevin Bogardus and Michael Doyle, "Bernhardt referred complaint over IG staff for outside Probe" <https://www.eenews.net/stories/1060303463>

² See Christopher Solomon, "Ryan Zinke's Interior Is a Mess" <https://www.outsideonline.com/2358331/zinkes-interior-mess>

³ See Grace Segers and Arden Farhi, "Interior Department watchdog investigating Zinke is still on the job despite her rumored ouster" <https://www.cbsnews.com/news/interior-department-acting-inspector-general-mary-kendall-investigating-zinke-still-on-the-job-despite-rumored-ouster/>

17. On January 20, 2019, President Trump's nominated Mark Greenblatt to become DOI's Inspector General to replace Mary Kendall.

18. In April 2019, DOI acting Inspector General Mary Kendall began investigations in Secretary Bernhardt. It is unclear whether other investigations began earlier.⁴

19. In May 2019, acting DOI Inspector General Mary Kendall stepped down despite Mark Greenblatt still not being confirmed.

20. President Trump appointed Gail S. Ennis at the acting DOI Inspector General until a permanent Inspector General is confirmed. She is also serving as the Inspector General for the Social Security Administration.

21. To date, acting Inspector General, Gail S. Ennis, has not reported on her investigation of Secretary Bernhardt.

22. Further, FOIA officials have allowed political appointees to review and withhold documents, which had been approved for disclosure.⁵

Fair Market Housing Coalition's FOIA Request

23. On May 1, 2019, Fair Market Housing Coalition submitted FOIA request OS-2019-00819, seeking, "All the emails, attachments, draft and electronic records from January 1,

⁴ See Matthew Renda, "Interior Department Opens Ethics Inquiry into New Leader" <https://www.courthousenews.com/interior-department-opens-ethics-inquiry-into-new-leader/>

⁵ See Jacob Holzman and Benjamin J. Hulac, "Interior held back FOIA'd documents after political screenings" <https://www.rollcall.com/news/interior-held-back-documents-after-political-screenings>

2018 until the present for: Ryan Zinke, Mary Kendall and David Bernhardt. The following terms should be searched: Oilfield services, Suzanne Tufts, Investigation, investigate, Unethical behavior, Ethical, Office of Inspector, Ben Carson, Censor, Climate change, Halliburton, Retirement, Montana real estate deal.” A copy of this FOIA request is attached as Exhibit 1.

24. The Fair Market Housing Coalition submitted this request to promote transparency for urban and rural land interests and other matters of significant public interest and to ascertain whether Secretary Bernhardt, Secretary Zinke and Secretary Carson have been acting in the public interest.

25. The Fair Market Housing Coalition did not request expedited processing but did request that a fee waiver be granted for the request.

26. The Fair Market Housing Coalition has heard from DOI about the processing of these requests and stated that, “Because we will need to search for and collect requested records from field facilities or other establishments that are separate from the office processing the request, we are taking a 10-workday extension under 43 C.F.R. § 2.19. For the same reason, we are placing your request under the “Normal” processing track. See 43 C.F.R. § 2.15.”

27. To date DOI has not provided any documents responsive to the Fair Market Housing Coalition’s request.

28. More than 20 working days plus an additional ten days have passed since the Fair

Market Housing Coalition submitted this request without any further communication.

LEGAL BACKGROUND

29. The Freedom of Information Act, 5 U.S.C. § 552, reflects, “a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting legislative history) (internal quotation marks omitted). FOIA “shines a light on government operations ‘to check against corruption and to hold the governors accountable to the governed.’” *Coleman v. Drug Enforcement Admin.*, 714 F.3d 816, 818–19 (4th Cir. 2013) (quoting *Nat’l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

30. “[T]he time provisions of the Act are central to its purpose.” *Hayden v. U.S. Dep’t of Justice*, 413 F. Supp. 1285, 1288 (D.D.C. 1976). FOIA requires federal agencies to “promptly” make records available upon request. 5 U.S.C. § 552(a)(3)(A). Agencies must “determine . . . whether to comply” with a request within 20 working days of receiving the request, and they must “immediately notify” the requester of that determination. *Id.* § 552(a)(6)(A).

31. To make a “determination” under FOIA, “the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d

180, 186 (D.C. Cir. 2013).

32. Agencies may extend their deadline for responding by up to 10 working days if unusual circumstances apply and they provide timely notice to the requester. Id. § 552(a)(6)(B).

33. Under EPA regulations and FOIA, if the agency seeks to extend a deadline further than 10 working days, it must work with the requester to modify the request so it can be fulfilled within the 10 working day extension or arrange an alternative time period. 40 C.F.R. § 2.104(d); 5 U.S.C. § 552(a)(6)(B)(ii).

CLAIMS FOR RELIEF Count 1

34. Plaintiffs incorporate by reference paragraphs 1 through 37 of this Complaint as if fully stated herein.

35. Defendant DOI has violated FOIA by failing to provide Plaintiff Fair Market Housing Coalition with all non-exempt responsive records for its May 1, 2016 FOIA request.

36. By failing to provide the Fair Market Housing Coalition with all non-exempt responsive records to its FOIA request as described in paragraphs 27 above, Defendant DOI has denied the Fair Market Housing Coalition's right to this information as provided by law under the Freedom of Information Act.

37. Unless enjoined by this Court, Defendant DOI will continue to violate the Fair Market Housing Coalition's legal right to be provided with copies of the records which it

has requested in its FOIA request as described in paragraphs 27 above.

38. The Fair Market Housing Coalition is directly and adversely affected and aggrieved by Defendant DOI's failure to provide responsive records to its FOIA request as described above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- (i) Declare that DOI has violated and is continuing to violate FOIA by failing to timely respond to the Fair Market Housing Coalition's FOIA request;
- (ii) Declare that DOI has violated and is continuing to violate FOIA by improperly withholding documents that are responsive to the Fair Market Housing Coalition's request;
- (iii) Direct DOI to provide all nonexempt, responsive documents to the Fair Market Housing Coalition without further delay;
- (iv) Retain jurisdiction over this matter to rule on any assertions by DOI that certain responsive documents are exempt from disclosure;
- (v) Order DOI to produce an index identifying any documents or parts thereof that it withholds and the basis for the withholdings, in the event that DOI determines that certain responsive records are exempt from disclosure;

(vi) Award Plaintiffs their reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E);

(vii) Grant any other relief the Court deems just and proper.

Respectfully submitted, this 6th day of July, 2019.

/s/ Zofia Rawner

Zofia Rawner – AZ Bar No. 026089

FAIR MARKET HOUSING COALITION
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Attorneys for Plaintiff Fair Market Housing Coalition

EXHIBIT 1



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

IN REPLY REFER TO:
7202.4-OS-2019-00819

May 1, 2019

Via email: susanfmhc@gmail.com

Susan Hudson
Fair Market Housing Collection
5442 East Cheery Lynn Road
Phoenix, AZ 85018

Dear Ms. Hudson:

On May 1, 2019, you filed a Freedom of Information Act (FOIA) request seeking the following:

All the emails, attachments, draft and electronic records from January 1, 2018 until the present for:

Ryan Zinke
Mary Kendall
David Bernhardt

The following terms should be searched:

Oilfield services
Suzanne Tufts
Investigation, investigate
Unethical behavior
Ethical
Office of Inspector
Ben Carson
Censor
Climate change
Halliburton
Retirement
Montana real estate deal

Your request was received in the Office of the Secretary FOIA office on May 1, 2019, and assigned control number **OS-2019-00819**. Please cite this number in any future communications with our office regarding your request.

For records pertaining to Mary Kendall's emails, you will have to file a FOIA request with the Office of the Inspector General (OIG). OIG FOIA can be reached via email at Stefanie.jewett@doioig.gov.

Ms. Susan Hudson

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We have classified your request as an “other-use request.” As an “other-use requester” you are entitled to up to 2 hours of search time and 100 pages of photocopies before being charged for the processing of FOIA requests. As a matter of policy, however, the Department of the Interior does not bill requesters for FOIA fees incurred in processing requests when their fees do not exceed \$30.00, because the cost of collection would be greater than the fee collected. (See 43 C.F.R. §2.18(a)).

Fee Waiver:

You have asked for a waiver of all FOIA processing fees. Please be advised that we are in the process of determining whether or not your entitlements are sufficient to enable us to process your request, or if we will need to issue a formal determination on your request for a fee waiver.

You have asked for copies of agency records. According to our regulations, you may choose the format of disclosure for such records. Unless you specify otherwise, the Office of the Secretary will provide copies of responsive records electronically via email or CD-ROM as scanned PDF images when the responsive records exceed 50 pages.

Because we will need to search for and collect requested records from field facilities or other establishments that are separate from the office processing the request, we are taking a 10-workday extension under [43 C.F.R. § 2.19](#). For the same reason, we are placing your request under the “Normal” processing track. See [43 C.F.R. § 2.15](#).

If you have any questions regarding the status of your request, or any of the issues discussed in this letter, you may contact Cindy Sweeney by phone at (202) 513-0765, by fax at (202) 219-2374, by e-mail at os_foia@ios.doi.gov or by mail at U.S. Department of the Interior, 1849 C St NW, MS-7328 MIB, Washington, DC 20240. You also may seek dispute resolution services from our FOIA Public Liaison, Clarice Julka.

Sincerely,

Clarice Julka
Office of the Secretary
FOIA Officer